



Date: January 27, 1999

Case No. 1998-INA-59

In the Matter of:

WASH-N-VAC CARWASH

Employer,

on behalf of:

JOSE HERNANDEZ-GARCIA

Alien.

Certifying Officer: Rebecca Marsh Day
San Francisco

Appearance: Aggie R. Hoffman, Esq.

Before: Holmes, Lawson and Wood
Administrative Law Judges

JAMES W. LAWSON
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application filed on behalf of the alien by the employer under §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A) (the Act) and the regulations promulgated thereunder, 20 CFR Part 656.¹ After the Certifying Officer (CO) of the U.S. Department of Labor (DOL) issued a Final Determination (FD) denying the application, the Employer requested review pursuant to 20 CFR § 656.26.²

¹The following decision is based on the record upon which the CO denied certification, including the Notice of Findings (NOF), rebuttal and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

²Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

THE PROCEEDINGS

Employer seeks to fill the position of Maintenance Car Wash Mechanic with DOT Title Maintenance Mechanic, DOT # 638.281-014, a wage offer of \$1,900 per month, job duties of:

Uses a variety of machine tools, to repair machine & maintain industrial machines, applying knowledge of mechanics, metal properties, layout. Observes and listens to operating machines or equipment to diagnose machine malfunction and determine need for adjustment or repair of all pumps, motors, changers, coin receptors, low pressure units, high pressure units, plumbing units, and electrical units. Studies blueprints, sketches, machine parts or specifications to diagnose & repair. Dismantles machine or equipment, using handtools or power tools, to examine parts for defect or to remove defective part. Replaces defective parts. Assembles and test operates machine to verify correction of malfunction. Maintains and lubricates machine tools and equipment. Pulls money out of safe and changers. Counts and deposits money. Takes inventory of supplies and orders more when necessary. Travels to 4 locations of Employer (Rancho Cucmanga, Chino & Pomona) collecting coins daily. Directs clean up and supervise workers at each location. (AF 27)

and job requirements of two years of experience in the job offered or two years' experience in the related occupation of working in the field of repair and maintenance of automated machinery.

The application was denied by the CO on the basis that the employer unlawfully rejected a qualified U.S. worker, Pete C. Marquez. (AF 9)

CONTENTIONS ON APPEAL

On appeal, employer contends, among other things, that a good-faith effort was made to recruit qualified U.S. workers and that the reasons for the rejection of applicant Mr. Pete

Marquez, were lawful. It is employer's position that despite a typographical error on Mr. Marquez' resume, the certified invitation letter to schedule an interview with the employer was received within one day of its mailing. Given the fact that Mr. Marquez never responded, employer asserts that the applicant had given the impression that he was either unwilling or unavailable for the position and that a follow-up telephone call was unwarranted. (Statement of Position, p. 5) Employer also maintains that there is nothing in the regulations that requires an employer to place follow-up telephone calls to applicants when the evidence clearly shows that the primary method was sufficient. For these reasons, employer contends that it has met its burden of proof since Mr. Marquez has clearly shown that he was either ***not willing or not available*** "at the time of the initial consideration and referral." (Statement of Postition, p. 6)

In addition to the applicant's failure to respond to the invitation letter, employer argues that the CO's denial was "arbitrary and capricious" since employer had adequately documented its efforts to recruit seemingly qualified U.S. workers. Therefore, employer represents that since Mr. Marquez did not pursue employment, after being timely contacted for an interview, certification should be granted.

DISCUSSION

As the sole grounds for denial of certification the FD stated:

The Notice of Findings clearly advised the employer to currently contact and interview Pete C. Marquez. The employer was provided the applicant's address and telephone number.

The employer failed to contact and interview Mr. Marquez as required in the Notice of Findings, failed to document the specific job-related reasons for rejection, and to submit documentation showing that the applicant was not qualified, willing or available. (AF 9)

The NOF had stated:

The employer rejected Pete C. Marquez because he failed to respond to a certified letter mailed on June 5, 1996. The letter was mailed to 16551 Valejo Street, Victorville. Based on a telephone conversation with Mr. Marquez and a review of the EDD registration sheet, the correct address is 16151 Vallejo Street, Victorville, CA 92392. His telephone number is (619) 245-3476. Mr. Marquez had just recently moved to this new address; therefore, there was a typographical error on his resume; however, his telephone number was and is still correct.

The employer failed to document that an attempt to follow-up by a telephone call was made to the applicant.

The employer must currently contact and interview the Pete C. Marquez. His address is 16151 Vallejo Street, Victorville, CA 92392; telephone number (619) 245-3476.

Documentation must be provided showing that the applicant was not qualified, willing or available at the time of initial consideration and referral. If the employer rejects the applicant, written documentation sent by certified return receipt mail must be sent to the applicant. If a telephone call/interview is conducted, documentation such as a telephone bill must be submitted. (AF 23)

The rebuttal did not follow the CO's directions in the NOF, but instead produced Postal Service Form 3811-A "Domestic Return Receipt (*After Mailing*)" dated August 15, 1997 showing "Return receipt WAS paid for at time of mailing", mailing date of 6/5/96, delivered to Elvira Marquez" on 6/6/96. As pointed out in the Employer's December 13, 1997 brief :

The NOF did not allege that Mr. Marquez did not receive the Employer's certified letter. Instead it faulted Employer for failing "...to document that an attempt was made to follow-up by a telephone call...to the applicant." See p. 2., paragraph 5 of NOF. (Brief p.2)

The reason for not following the exact instructions in the NOF is apparent from the Brief:

On August 13, 1997, Employer contacted the C.O. in an effort to identify the regulation on which the C.O. was relying in requiring the Employer to contact a job applicant who had not responded to a letter inviting him for an interview. A copy of the August 13, 1997 letter is attached hereto as Exhibit "11." On August 24, 1997, the C.O. replied citing 656.21(b)(7) sic, and 656.21(j)(1)(iv) and alleging, for the first time, that "Mr. Marquez was the only applicant who did not return the certified return receipt." The C.O. further asserted another new requirement--to wit that "in order to show a good faith effort to interview and consider applicants, it is normal and customary for an employer to follow-up with a telephone call." See p.1 of August 25, 1997 letter. Finally, the C.O. stated that the U.S. Department of Labor considers a qualified U.S. worker to be available at he (sic) initial time of the referral and consideration. A copy of the C.O.'s August 25, 1997 letter is attached as Exhibit "12." (Brief pp.2-3)

Thus the only reason for denying certification for rejection of Marquez was the lack of a certified return receipt, which was cured on rebuttal. Examination of the employer's detailed recruitment report confirms that a diligent recruitment effort was made. (AF 31-36) That report is accurately summarized on Brief:

On or about July 15, 1997, pursuant to 656.21(j)(1), Employer submitted its Final Documentation explaining that 6 applicants submitted resumes. A copy of each resume was attached to the Final Documentation. Employer provided evidence that he contacted

each such applicant via certified mail, return receipt requested, either requesting an explanation of discrepancies in the applicants' employment history as it appeared on the resume, or inviting the applicant for a job interview; that Employer interviewed three applicants Anthony Blanus, John Nugent, and Ronald Nelson); that each person interviewed was rejected for bona fide, job related reasons; and that the other three applicants, Mario Pena, Leon Pearson, and Pete Marquez did not reply to Employer's letters. (Brief p.2)

Under the circumstances, it must be concluded that Marquez was not available and that employer's recruitment was proper.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED** and the alien is herewith ordered **CERTIFIED**.

For the Panel:

JAMES W. LAWSON
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400**

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Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

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